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No. 10-1100

IN THE

Supreme Court of the United States

JACOB DOE, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JAMES DOE, ET UX., ET AL.,
Petitioners,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP ESTATE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the exercise of discretion by a district court, sitting in Honolulu and familiar with the local community, to deny Petitioners' motion to proceed anonymously in their challenge to Respondents' Native Hawaiian admissions policy, where their alleged fear of reprisal was based upon a handful of anonymous Internet comments and news stories unrelated to Respondents or this case.

RULE 29.6 STATEMENT

Kamehameha Schools/Bernice Pauahi Bishop Estate is a private, charitable, not-for-profit educational institution. Accordingly, it has no parent company and no stockholders.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Kamehameha Schools/Bernice Pauahi Bishop Estate, and Nainoa Thompson, Diane J. Plotts, Corbett A. K. Kalama, Robert K. U. Kihune, and J. Douglas Ing, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate (hereinafter collectively "KS"), respectfully submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT

In the decision below, a unanimous panel of the Court of Appeals for the Ninth Circuit held that the district court did not abuse its discretion or make

clearly erroneous factual findings when it denied Petitioners' motion to proceed anonymously. This narrow and fact-bound decision has little applicability beyond this case, and does not conflict with any decision of this Court or present any important question that warrants this Court's attention. Nor is this one of the rare decisions properly reviewed under this Court's "supervisory power," as it does not involve any departure from proper judicial administration. To the contrary, the decision reflects standard application of abuse-of-discretion review and proper deference to a magistrate judge and a district judge who were both intimately familiar with the local community and who thoroughly considered and rejected, over the course of three lengthy written opinions, Petitioners' asserted grounds for anonymity. The petition should be denied.

1. "The Kamehameha Schools were created under a charitable testamentary trust established by the last direct descendent of King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 831 (9th Cir. 2006) (*en banc*) ("*Doe I*") (internal quotation marks omitted). To carry out its mission of improving the capability and well-being of Native Hawaiians through education, KS applies an admissions policy that gives a preference to Native Hawaiians in many of its educational programs. 1 S.E.R. 118. Contrary to Petitioners' assertion (Pet. 3), however, this preference does not operate as an absolute exclusion of non-Native Hawaiians. In fact, when places are available, non-Native Hawaiians are

admitted, and a non-Native Hawaiian student was admitted without incident during the current school year.[1]

In *Doe I*, the Ninth Circuit, sitting *en banc*, upheld KS's admissions policy against a challenge brought under 42 U.S.C. § 1981 by plaintiffs who were represented by Petitioners' lead counsel in the current action, Eric Grant. That case settled while a petition for a writ of certiorari was pending in this Court. *See* Pet. App. 5a. This case arises from Petitioners' stated ambition to overturn *Doe I*. 2 E.R. 299.

While KS acceded to the plaintiffs' request for anonymity in *Doe I*, it declined to do so in the current case. In the interim between the initiation of *Doe I* and the current case, KS had had successful experiences with the admission of non-Native Hawaiian students to its campuses, and thus saw no basis for Petitioners' asserted fears of retaliation and reprisal. In particular, KS had successfully enrolled non-Native Hawaiian students Kalani Rosell (1 S.E.R. 80-82) and Brayden Mohica-Cummings, who was admitted after suing in his own name, again represented by Mr. Grant (1 S.E.R. 83-85). Both students were welcomed at KS, and suffered no threatened or actual harm despite the public controversy surrounding their admission. Mr. Grant himself stated in a televised interview that Mohica-Cummings was "doing great, he's enjoying himself, he's made a lot of friends and is fitting right in." 1 S.E.R. 86. And, in an interview shortly before his graduation in 2007, Mr. Rosell described the "close feeling of *ohana*, of family"

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[1] *See, e.g.*, *Kamehameha Admits Non-Native Hawaiian*, MAUI NEWS (July 10, 2010), *available at* http://www.mauinews.com/page/content.detail/id/533273.html?nav=5031 (last visited Apr. 5, 2011).

at the school, where "[e]very teacher is like a parent or relative, and each student is like a brother or sister." 1 S.E.R. 82.

In declining to consent to Petitioners' request to proceed anonymously in this case, KS was also motivated by the need for discovery in order to challenge Petitioners' standing, as it would be hampered in pursuing third-party discovery from teachers and academic staff if it was unable to reveal Petitioners' identities. Finally, KS was aware of a host of other challenges to Native Hawaiian programs that plaintiffs all had pursued in the district court in Hawai`i under their real names without any actual or threatened harm. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007); *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002).

2. The minor Petitioners applied for admission to KS's K-12 campus program for the 2008-09 school year, but none was admitted. 2 E.R. 300. In August 2008, Petitioners filed a complaint alleging that KS's admissions policy violates Section 1981. 2 E.R. 298-306.

Petitioners moved to proceed anonymously. They specifically denied any fear of "possible retaliation and ostracism at KS" by students, faculty, or staff. 1 S.E.R. 32c n.2. Instead, they contended that disclosing their identities would lead to retaliation by the public, based on a few anonymous Internet comments that their counsel culled from various newspapers' websites (2 E.R. 242-85), news articles about Rosell and Mohica-Cummings (2 E.R. 218-23), and news articles about a few hate crimes in Hawai`i wholly

unrelated to KS, its admissions policy, or this case (2 E.R. 224-36).

In support of their motion, three of the adult Petitioners also submitted affidavits. 2 E.R. 286-97. In the affidavits, each virtually a verbatim copy of the other, the parents stated their belief that their children would be "subjected to retaliation and harassment" and "serious risk of physical attacks" and were "very likely to be socially ostracized" if their identities were revealed. 2 E.R. 288, 292, 296. They based these fears solely upon unspecified media reports and comments about Native Hawaiian issues, as well as their awareness "of many rallies and marches, some involving thousands of people, in support of Kamehameha's admissions policy." 2 E.R. 288, 292, 296.[2]

3. The magistrate judge denied Petitioners' motion to proceed anonymously in a comprehensive, 22-page opinion addressing each factor that the Ninth Circuit set forth in that Circuit's leading case on plaintiff anonymity, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).[3] With respect to

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[2] Petitioners also offered a conclusory declaration from the *Doe I* parent/plaintiff stating that, in light of the disclosure in the media of the substantial monetary settlement she received in *Doe I*, she would fear for her safety if her identity were disclosed. 2 E.R. 238-41. She based this purported fear on three anonymous Internet comments (taken from 1551 comments on the *Honolulu Advertiser* website) (2 E.R. 240-41) and her unspecified "experience with many local residents" (2 E.R. 241).

[3] *Advanced Textile* instructs lower courts to evaluate the following factors when a plaintiff seeks to proceed anonymously: (1) "the severity of the threatened harm"; (2) "the reasonableness of the anonymous party's fears"; (3) "the anonymous party's vulnerability to such retaliation"; (4) "the precise prejudice at each stage of the proceedings to the opposing party"; and

the first factor, severity of harm, the magistrate judge ruled that "none of Plaintiffs' evidence shows any threat of physical violence or economic harm against Plaintiffs ...." Pet. App. 56a. Of the Internet comments Petitioners submitted, the magistrate judge found that "only four [were] conceivably made against Plaintiffs" (Pet. App. 54a) and none was an actual threat: two addressed "how Plaintiffs might be treated if they are admitted to Defendants' school" (Pet. App. 55a)—a concern Petitioners themselves had disavowed (1 S.E.R. 32c n.2)—and the other two merely "voice[d] the commentators' frustration with this lawsuit" (Pet. App. 56a (citing 2 E.R. 276, 285)).[4] The magistrate judge discounted reported public reaction against Mohica-Cummings' admission in 2002, noting that even the U.S. Attorney who urged public calm at the time (a warning one of Mohica-Cummings's own attorneys deemed "unnecessary" (1 S.E.R. 84)) was "unaware of any credible threats." Pet. App. 53a. And the magistrate judge discounted news articles about hate crimes in Hawai`i as "not connected to any of the parties in this action, nor [involving] threats against anyone challenging Defendants' admissions policy." Pet. App. 54a.

With respect to the second *Advanced Textile* factor—reasonableness of Petitioners' fears—the magistrate

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(5) "whether the public's interest in the case would be best served by requiring that the litigants reveal their identities." 214 F.3d at 1068.

[4] Petitioners now rely on just two anonymous Internet comments. Pet. 6. Both comments ("youre jus gonna get lickins everyday" and "one day they're gonna be targeted by some crazy Hawaiian or group of Hawaiians armed with baseball bats or guns") constitute mere hyperbole or wild speculation about what others might do, and the latter comment is further discredited by its baseless racial disparagement of Native Hawaiians.

judge concluded that, "without evidence of any threats of physical violence or economic harm against them, a reasonable person would not believe that Plaintiffs might be physically or financially threatened." Pet. App. 57a. As to the public-interest factor, the magistrate judge recognized that, "[a]s in other civil rights cases, the public has a strong interest in knowing who is using the courts to vindicate their rights." Pet. App. 61a. The magistrate judge also discussed the remaining *Advanced Textile* factors, concluding that only the young age of some Petitioners weighed in favor of anonymity. Pet. App. 58a-60a. The magistrate judge then balanced the factors and ruled that Petitioners had not overcome the "presumption, firmly rooted in American law, of openness in judicial proceedings." Pet. App. 63a (quoting *Doe v. Merten*, 219 F.R.D. 387, 390 (E.D. Va. 2004)).

4. Petitioners moved for reconsideration after anonymous Internet comments were posted in response to the magistrate judge's ruling and Petitioners' well-known Hawai`i counsel received an email of unknown origin and allegedly received a threatening phone call. The magistrate judge denied reconsideration in a 10-page written decision (Pet. App. 38a-46a), explaining that the new Internet comments were "of the same character and nature as the evidence [he] previously considered and [were] no more probative of a severe threat of harm or a reasonable fear of harm" (Pet. App. 43a); that none of the three anonymous Internet comments that Petitioners contended were directed toward them contained any threats (Pet. App. 43a-44a);[5] that the anonymous

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[5] Petitioners now point to five Internet comments. Pet. 7. The first, second, and fifth comments ("Good that the judge ordered them to make these little brats names known to the

email was not directed toward Petitioners (Pet. App. 45a); and that the alleged anonymous phone call to Petitioners' counsel merely "voice[d] frustration with the lawsuit but [did] not show a severe threat of harm" (*id.*). Instead, as the magistrate judge noted, "Plaintiffs' evidence confirms that, under the cloak of anonymity, people will make outrageous, offensive, and even nonsensical statements." *Id.*

5. Petitioners appealed to the district court, which affirmed in a 19-page written decision. Pet. App. 20a-37a. As to the severity of supposedly threatened harm, the district court concluded that the magistrate judge's "thorough analyses of the evidence are not clearly erroneous or contrary to law," noting that the magistrate judge "went through each type of alleged threat in detail ... and explained why the evidence did not indicate a threat of harm to Plaintiffs," including the evidence adduced after his initial decision. Pet. App. 34a-35a.

As to the reasonableness of Petitioners' fear of harm, the district court rejected Petitioners' contention that the magistrate judge had failed to view the evidence through the eyes of a reasonable person in their position. Pet. App. 35a-36a. Noting that the

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public, so they can be tormented by their fellow students and general public;" "4 kids ... will need 10 bodyguards lol;" and if their names were revealed, Petitioners "would have to watch their backs for the rest of their lives!") constitute idle speculation that has no significance in light of Petitioners' repeated concession that they have no reason to fear any harm from any student, teacher or staff member at KS. The third comment ("Sacrifice them!!!!!!!!") is nonsensical. And the fourth comment ("stringing up those scum lawyers is not such a bad idea") expressly disclaims any seriousness ("Don't be scared, it's in the Halloween spirit" (2 E.R. 123)).

magistrate judge had explicitly followed the *Advanced Textile* framework, the district court concluded that, "[g]iven the absence of threats directed to Plaintiffs, no reasonable person in *any* position would believe a threat would be carried out." Pet. App. 36a.

Having been rebuffed by two judges who were closely familiar with the community in which this dispute arose and thus were able to assess the Internet statements in context, Petitioners declined to undertake an interlocutory appeal under the collateral order doctrine, *see Advanced Textile*, 214 F.3d at 1066-67. Instead, they voluntarily dismissed their complaint with prejudice, stipulated to final judgment, and appealed that judgment to the Ninth Circuit.

6. On appeal, a unanimous panel of the Ninth Circuit (Beezer, J., joined by Graber and Fisher, JJ.) affirmed the district court's decision, noting "the paramount importance of open courts" and reiterating that "the default presumption is that the plaintiffs will use their true names." Pet. App. 18a. Applying deferential abuse-of-discretion review and stressing that "[i]t is in the particular purview of the district court to view alleged threats in context and determine what the 'reasonable' person in the plaintiffs' situation would fear," Pet. App. 15a, the panel concluded that:

> (a) "[t]he magistrate judge correctly recognized that many times people say things anonymously on the internet that they would never say in another context and have no intention of carrying out" (Pet. App. 16a);

(b) "[t]he magistrate judge noted that plaintiffs had culled only a few comments out of hundreds of anonymous comments regarding this case" (Pet. App. 16a-17a);

(c) the district court "correctly evaluated [Petitioners'] concession 'that they are not fearful of retaliation and ostracism at [KS] if and when they are admitted' in discounting the threats that the children would get 'lickins' everyday at school" (Pet. App. 17a);

(d) "Rosell and Mohica-Cummings both attended [KS] with no reported incidents—either at school or outside the school setting" (Pet. App. 17a); and

(e) "Mohica-Cummings used his real name in litigation against [KS], and his counsel specifically stated that the U.S. Attorney's warnings to the public were unnecessary" (Pet. App. 17a).

The panel also held that the district court did not abuse its discretion in concluding that the public-interest factor did not favor anonymity, "[g]iven the strong general presumption that plaintiffs will conduct litigation under their own names." Pet. App. 13a. And the panel concluded that the remaining factors—plaintiffs' vulnerability and prejudice to defendants—did not tip the balance toward anonymity. Pet. App. 17a-18a.

7. Petitioners then filed a petition for rehearing *en banc*. The petition was denied over two dissents. One dissenter, Chief Judge Kozinski, disregarded the magistrate judge's and the district judge's factual findings and would have permitted Petitioners to proceed anonymously based on his view that the anonymous comments made on the Internet and to Petitioners' counsel constituted "threats" that "suggest[ed] or

urge[d] physical violence on account of the lawsuit." Pet. App. 67a-68a. In light of the denial of rehearing *en banc*, however, Chief Judge Kozinski urged Petitioners to seek "to set aside the dismissal of their claims, perhaps under Fed. R. Civ. P. 60(b), so they can file a complaint that complies with Fed. R. Civ. P. 5.2(a)." Pet. App. 68a.[6]

The second dissenter, Judge Reinhardt, was influenced by his view, unsupported by the record, that this case "unfolded in a racially charged atmosphere." Pet. App. 72a. He understood Congress's ratification of Rule 5.2(a) as an expression of "its judgment that the interest of minors in privacy is greater than the public's interest in learning their names, even when there is no particular threat to the juvenile's physical safety or well-being." Pet. App. 75a. He acknowledged that, even though Petitioners did not avail themselves of Rule 5.2(a), the availability of that rule in other cases involving minor plaintiffs makes similar cases "likely not [to] recur in the future ...." Pet. App. 77a.

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[6] Rule 5.2(a) states:

> Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
>
> (2) the year of the individual's birth;
>
> (3) the minor's initials; and
>
> (4) the last four digits of the financial-account number.

FED. R. CIV. P. 5.2(a).

Judges Beezer, Graber, and Fisher—the members of the initial panel—concurred in the denial of rehearing *en banc* and wrote separately to respond to the dissenters. Pet. App. 90a-98a. With respect to Rule 5.2(a), the panel noted that the rule is discretionary (Pet. App. 92a), and that, in any event, no party had relied upon the rule "before the magistrate judge, the district judge, or in their respective briefs before this court" (Pet. App. 91a). The panel also explained that Petitioners' failure to invoke the rule was not surprising since "Rule 5.2 permits minors to proceed with their initials, not as 'Doe' or otherwise anonymously" (Pet. App. 91a) and "plaintiffs sought anonymity, not veiled identification" (Pet. App. 92a).

Apart from Rule 5.2(a), the panel rejected, as a "false choice," the dissenters' "rather Faustian choice between anonymity and civil rights litigation on one side, and disclosure and violence on the other." Pet. App. 92a. The panel stated that it "did not take lightly the possibility that civil rights litigation may be chilled by disclosure," but noted that the *Advanced Textile* test had been around since 2000 "with no apparent effect on civil rights litigation." Pet. App. 93a. The panel pointed out, moreover, that "the most important civil rights cases involving juveniles have all been cases where the plaintiffs used their real names, rather than pseudonyms." *Id.* The panel understood the dissenters' concern for Petitioners' safety as nothing more than their disagreement "with the district judge's factual finding that the Doe children do not reasonably fear severe harm" and reiterated that "a fair reading of the record reveals that the district court's factual finding was not clearly erroneous." Pet. App. 94a.

Finally, the panel again recognized that, while the vulnerability of juveniles "is certainly one [factor] that weighs in favor of anonymity ... it is still only one factor," and a plaintiff seeking to proceed anonymously must also "reasonably fear sufficiently 'severe' harm" to overcome the "almost universal practice of disclosure." Pet. App. 96a-97a (internal quotation marks omitted). Since the district court's finding that Petitioners did not reasonably fear severe harm was not clearly erroneous, the panel agreed that rehearing *en banc* was unwarranted.

REASONS FOR DENYING THE PETITION

Petitioners do not assert any conflict with this Court's decisions or any conflict with any decision of another court of appeals or state high court. Nor do Petitioners contend that this case gives rise to any issue of national importance warranting this Court's review. Petitioners rely solely on this Court's "supervisory power" as a basis to grant the petition. But this Court's supervisory power has been invoked as a basis for certiorari only when procedural questions of judicial administration are involved. This case presents no such question.

To the contrary, this case involves merely the standard application of well-settled circuit precedent by a district court to a narrow and unique set of facts, subject to standard abuse-of-discretion review by the court of appeals. Under that deferential standard, the court of appeals was correct in affirming the district court's denial of the motion to proceed anonymously. The panel properly deferred to the extensive factual findings by the magistrate judge and the district judge that Petitioners had no objectively reasonable fear of harm. Its decision is consistent with the strong public interest in "open courts" expressed in

the requirement in Fed. R. Civ. P. 10(a) that "[t]he title of the complaint must name all the parties." And the decision below is likewise consistent with Fed. R. Civ. P. 5.2(a), which Petitioners raise for the first time in this Court.

Petitioners should not be permitted to invoke this Court's supervisory power as a vehicle for a back-door attack on the merits of the district court's factual findings and exercise of its discretion. The petition presents no issue of significance beyond the narrow and highly specific circumstances of this case. The petition should be denied.

I. THE QUESTION PRESENTED DOES NOT IMPLICATE THIS COURT'S SUPERVISORY POWER

Conceding that they lack any standard basis to seek a writ of certiorari, Petitioners ask this Court to grant certiorari under its "supervisory power," arguing that the decision below "departed from 'the accepted and usual course of judicial proceedings.'" Pet. 15 (quoting SUP. CT. R. 10(a)). This rarely used basis for obtaining review, however, has no applicability in this case, where the question presented does not relate to the operation of the federal judiciary.

Contrary to Petitioners' intimations (Pet. 15), the "supervisory power" provision of Rule 10(a) is not a catch-all provision that sanctions review of perceived errors in the courts of appeals. Rather, it reflects this Court's "significant interest in supervising the *administration* of the judicial system." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (citing SUP. CT. R. 10(a)) (emphasis added). For example, in *Hollingsworth*, this Court granted a stay of a district court

order permitting audio and video broadcast of a bench trial to a number of federal courthouses. This Court concluded that the order was based on a local rule that likely had not been amended in compliance with federal law, *id.* at 710-12, and that certiorari would be appropriate because this Court's "interest in ensuring compliance with *proper rules of judicial administration* is particularly acute when those rules relate to the integrity of judicial processes," *id.* at 713 (emphasis added).

Similarly, in *Nguyen v. United States*, 539 U.S. 69 (2003), this Court acknowledged that it had granted certiorari "[i]n accordance with this Court's Rule 10(a) ... to determine whether the Court of Appeals had 'so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.'" *Id.* at 73-74 (quoting Pet. for Cert. in No. 01-10873, p.6; Pet. for Cert. in No. 02-5034, p.5). That case presented the question whether "the judgment of the Court of Appeals [was] invalid because of the participation of a non-Article III judge on the panel." *Id.* at 73. In electing to use its supervisory power despite the apparent absence of prejudice, this Court explained that "the error in these cases involves a violation of a statutory provision that 'embodies a strong policy concerning *the proper administration of judicial business*' ...." *Id.* at 81 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality opinion)) (emphasis added).

Thus, both *Hollingsworth* and *Nguyen* involved a procedural or operational issue as to how the federal courts are run. This case, in contrast, does not involve matters of judicial administration. It instead presents a straightforward dispute over the applica-

tion of Ninth Circuit precedent regarding rules of civil procedure for litigants, and a run-of-the-mill application of the abuse-of-discretion standard for appellate review.

Nor do the cases in which this Court has addressed "sound judicial practices" provide a basis for this Court to grant certiorari here. For example, in *Thomas v. Arn*, 474 U.S. 140 (1985), this Court addressed whether the Sixth Circuit had properly established a "prospective rule that failure to file timely objections [to a magistrate judge's Report and Recommendation] with the district court waives subsequent review in the court of appeals." *Id.* at 144-45. And in *United States v. Stanley*, 483 U.S. 669 (1987), the "judicial practice" at issue was whether the court of appeals could direct a district court to take action regarding a claim that was not part of an order certified for appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 676. Thus, unlike here, both *Thomas* and *Stanley* involved the internal operation of the federal judiciary.[7]

In short, the question presented here does not implicate this Court's "supervisory power," and Petitioners may not rely on this Court's Rule 10(a) in a

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[7] Petitioners' reliance on *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), is also perplexing, as there this Court granted certiorari "in view of the division among the Circuits on the question whether [28 U.S.C.] § 1782(a) contains a foreign-discoverability requirement," *id.* at 253, and ultimately "decline[d] ... to adopt supervisory rules" regarding § 1782(a) on the ground that "[a]ny such endeavor at least should await further experience with § 1782(a) applications in the lower courts," *id.* at 265. Here, there is no division among the courts of appeals, and, consequently, announcement of any "supervisory rule" would be premature.

disguised effort to ask this Court to correct a perceived error in the decision below. Because there is no asserted conflict among the courts of appeals, no asserted conflict with a past decision of this Court, and no asserted issue of national importance, the petition fails to present any plausible ground for certiorari.

II. EVEN IF THIS CASE DID IMPLICATE THIS COURT'S SUPERVISORY POWER, EXERCISE OF THAT POWER IS UNWARRANTED HERE

Exercise of this Court's "supervisory power" is warranted only where a decision "so far depart[s] from the accepted and usual course of judicial proceedings" as to necessitate this Court's intervention. SUP. CT. R. 10(a). Even if this case were within the scope of this Court's supervisory power, the court of appeals' decision does not come close to constituting such a departure. Petitioners contend that the decision below was "at odds with sound judicial practice" because it "overvalued" the public's right to "open courts" and "undervalued both the privacy and security concerns embodied in Federal Rule of Civil Procedure 5.2(a)." Pet. 15-16. But the balance between openness and privacy or security is merely an application of the merits test that settled circuit precedent applies to any motion to proceed anonymously. The magistrate judge, the district judge, and the court of appeals all adhered to the "accepted and usual course of judicial proceedings" in their application of that test, and that adherence gives no ground for the exercise of this Court's supervisory power.

A. The Decision Below Properly Respects The Public Interest In Open Judicial Proceedings Embodied In Fed. R. Civ. P. 10(a)

Rule 10(a) of the Federal Rules of Civil Procedure states that "[t]he title of the complaint must name all the parties," FED. R. CIV. P. 10(a)—a requirement Petitioners conspicuously fail to mention in contending that the decision below "overvalued" the public interest in "open courts." The courts of appeals have widely recognized that Rule 10(a), "though seemingly pedestrian, serves the vital purpose of facilitating public scrutiny of judicial proceedings and therefore cannot be set aside lightly." *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 188-89 (2d Cir. 2008); *see also Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("[W]e express our concern about the plaintiff's litigating under a pseudonym. Judicial proceedings are supposed to be open ... in order to enable the proceedings to be monitored by the public.") (Posner, J.) (internal citations omitted); *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) ("[Fed. R. Civ. P. 10(a)] protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.").

Contrary to Petitioners' suggestion (Pet. 17), Fed. R. Civ. P. 10(a) implicates far more than merely "a generalized, non-absolute, little delineated right of access to judicial records." As Judge Posner has put it, "[i]dentifying the parties to the proceeding is an important dimension of publicness. *The people have a right to know who is using their courts.*" *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.), *quoted in United States v. Stoterau*, 524 F.3d 988, 1013 (9th Cir. 2008)

(emphasis added). And as the Fifth Circuit has recognized, First Amendment principles are at stake when the public is precluded from knowing litigants' identities. *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("Public access to [plaintiffs' identities] is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings."); *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public.").

These basic principles are not undermined by the fact that, on occasion, parties in other cases cited by Petitioners (Pet. 17-19) have consented to the use of pseudonyms. As Petitioners concede (Pet. 19), in none of the cited cases did the courts address the permissibility of filing anonymously, presumably because no party raised an objection. Thus, the most that can be gleaned from these cases is that the courts did not, *on their own motion*, reach out to decide the anonymity issue. These cases hardly amount to a "long-standing practice in this Court ... [or] in the lower courts" (Pet. 18), and they say nothing about the public's interest in "open courts."

Plaintiffs seeking anonymity to pursue education-related civil rights claims remain the exception, not the rule. There is a strong tradition of plaintiffs filing civil rights suits in their own names in the education context, no matter how controversial their cause. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (constitutional challenge to race-based admissions preferences at public law school); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (constitutional challenge to race-based admissions preferences at public

university); *Lau v. Nichols*, 414 U.S. 563 (1974) (constitutional and statutory challenge to public school system's failure to provide English language instruction to students of Chinese ancestry); *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962) (constitutional challenge to racial segregation at the University of Mississippi).

This strong tradition extends to minors suing in their own names to vindicate civil rights in the education context. This Court's historic decision desegregating the public schools was captioned *Brown v. Board of Education*, 347 U.S. 483 (1954), not *Doe v. Board of Education*. *See also Runyon v. McCrary*, 427 U.S. 160 (1976) (Section 1981 challenge to whites-only admissions policies of two private schools in Virginia); *Lee v. Weisman*, 505 U.S. 577 (1992) (constitutional challenge to recital of prayer at public school graduation ceremony); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (constitutional challenge to recitation of Bible verse and prayer in public school); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (constitutional challenge to mandatory recital of pledge of allegiance in public school), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Similarly, as noted, many plaintiffs have sued in their own names when challenging preferences and entitlements for Native Hawaiians, both inside and outside of education. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000) (constitutional challenge to Hawaiian ancestry requirement for voting for trustees of Hawai`i's Office of Hawaiian Affairs); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007) (constitutional challenge to State of Hawai`i programs restricting benefits to "native Hawaiians" or "Hawaiians"); *Carroll v.*

Nakatani, 342 F.3d 934 (9th Cir. 2003) (constitutional challenge to provision of Hawai`i Constitution creating agencies that allocate benefits to Native Hawaiians); *Arakaki v. Hawai`i*, 314 F.3d 1091 (9th Cir. 2002) (constitutional and statutory challenge to requirement that trustees of the Office of Hawaiian Affairs be citizens of Hawaiian ancestry); *Kuroiwa v. Lingle*, 2008 WL 2622816 (D. Haw. July 3, 2008) (constitutional, statutory and common-law challenge to certain distributions by the Office of Hawaiian Affairs to Native Hawaiians). There is no indication that any of these plaintiffs has ever faced any reprisal, retaliation or other harm despite the controversial and emotionally charged nature of their challenges to preferences and entitlements for Native Hawaiians.

In fact, in 2003, when Petitioners' own lead counsel represented an eleven-year-old non-Native Hawaiian boy in a challenge to KS's admissions policy, the boy filed suit in his own name. *See Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, No. 03-cv-00441 (D. Haw.). Far from experiencing any violence, hostility or even ostracism at KS, Mohica-Cummings enjoyed such a warm welcome that his attorney, Mr. Grant (Petitioners' counsel of record here), stated in a televised interview that Mohica-Cummings was "doing great, he's enjoying himself, he's made a lot of friends and is fitting right in." 1 S.E.R. 86.

Against this backdrop, the lower courts did not depart from the usual course of proceedings in respecting the public interest in robust access to judicial proceedings.

B. The Decision Below Presents No Tension With Fed. R. Civ. P. 5.2(a)

Petitioners' belated invocation of Rule 5.2(a) provides no alternative ground for application of this Court's supervisory power. While Petitioners now fault the panel for "undervalu[ing] the child-protective policies embodied in" Rule 5.2(a) (Pet. 20), they never invoked that rule in the extensive proceedings before the magistrate judge, the district judge or the panel, or even when seeking rehearing *en banc*. Petitioners thus should be precluded from relying on Rule 5.2(a) at this late date. *See, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). And, contrary to Petitioners' suggestion (Pet. 20 n.7), the panel did not "pass upon" the Rule 5.2(a) question in the decision that Petitioners ask this Court to review. This fact is not altered by observations made in an opinion concurring in the denial of rehearing *en banc*.[8]

Even if consideration of Rule 5.2(a) were proper at this stage, the rule has not reversed the presumption against anonymity where the plaintiffs are minors, as Petitioners erroneously suggest (Pet. 20). Rule 5.2(a) provides in relevant part that, "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains ... the name of an individual known to be a minor ... a party or nonparty making

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[8] As the panel noted in its concurrence in the denial of rehearing *en banc* (Pet. App. 91a-92a), Petitioners' failure to show any interest in Rule 5.2(a) below may be attributable to the fact that Petitioners sought near-complete anonymity in every aspect of the case—anonymity far exceeding the limited use of initials contemplated by the rule. *See* 2 E.R. 160 (interim protective order limiting disclosure of Petitioners' identities to seven individuals).

the filing may include only ... the minor's initials." FED. R. CIV. P. 5.2(a). But presumptively requiring the use of a minor's initials does not mandate the near-complete anonymity in every aspect of a proceeding that Petitioners sought here. Nor does it apply on its face to adults that are parties (nominally or otherwise) to the action along with a minor like the parent Petitioners here. The rule is not mandatory and may be overridden in a court's discretion. Nor does it apply to all aspects of a case, but only to those documents that are filed with the court.

Moreover, a party seeking more than the limited redactions that Rule 5.2(a) requires bears the burden of demonstrating why greater protection is warranted. *See* FED. R. CIV. P. 5.2(e) ("*For good cause*, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.") (emphasis added); *cf. id.* advisory committee's note (2007) ("While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected."). And there is no indication in the committee notes accompanying the rule or in any materials generated during the approval process that the rule was intended to supplant, or even affect, the existing body of law regarding plaintiff anonymity.

Thus, Petitioners greatly overstate Rule 5.2(a)'s purpose and effect when they suggest that the rule "provides for anonymity of juveniles in federal litigation" (Pet. 22 (quoting Pet. App. 71a)) or "mandates that both courts and parties 'safeguard the identities

of minor children' in federal litigation" (*id.* (quoting Pet. App. 69a).[9]

None of this is to say that Petitioners' status as minors is irrelevant or insignificant. To the contrary, it is an important factor in the anonymity balance that the lower courts carefully conducted in this case under governing Ninth Circuit precedent. The panel (Pet. App. 17a), like the magistrate judge (Pet. App. 58a) before it, specifically considered the potential vulnerability of the minor Petitioners, and concluded that that fact, standing alone, did not warrant permitting them to proceed anonymously here. That decision is sound and, as the panel itself explained on denial of *en banc* review (Pet. App. 90a-92a), is in no way undermined by the limited protections in Rule 5.2(a).

III. THE FACTUAL CIRCUMSTANCES PROVIDE NO WARRANT FOR THIS COURT'S REVIEW

Petitioners finally abandon all pretense of trying to fit this case within this Court's certiorari standards and "candid[ly]" argue that the "compelling factual circumstances" of this case supposedly distinguish this case from the thousands of other petitions this Court considers and warrant this Court's *sui generis* review. Pet. 24, 25. Should this Court even reach

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[9] While Petitioners correctly note that Rule 5.2 was the result of Congress's directive in the E-Government Act of 2002 that this Court "prescribe rules ... to protect privacy and security concerns relating to electronic filing of documents" (Pet. 21 (quoting 44 U.S.C. § 3501 note)), Petitioners are incorrect to suggest that either Rule 5.2 or the Act was designed to protect physical security. Rather, as is clear from the rule's title—"*Privacy Protection* For Filings Made with the Court"—it is intended to protect personal privacy.

this improper basis for requesting certiorari, Petitioners' overwrought and highly misleading account of the facts requires correction.

First, Petitioners misstate the record from the very first page of their petition by suggesting that any court in this case ever found that those who challenge KS's admissions policy "face 'undoubtedly severe' threats of physical retaliation." Pet. i (emphasis removed). No such finding was ever made in this case. To the contrary, the overwhelming evidence in the record showed that, as the magistrate judge and the district judge found, Petitioners' fears of any such retaliation were unreasonable. *See, e.g.*, Pet. App. 14a; Pet. App. 35a-36a; Pet. App. 56a-58a. This evidence included Petitioners' own concession that they never feared any harm from the KS community. *See* Pet. App. 7a; 1 S.E.R. 32c n.2. To call physical threats "undoubtedly severe" if actually made is not the same as finding that anyone ever made them. And the magistrate judge and the district judge specifically found that Petitioners' fears of physical retaliation were objectively unreasonable, negating Petitioners' incorrect and inflammatory suggestion that any such threats had ever been found to have materialized.

Second, Petitioners deem every anonymous and fleeting Internet comment a real and serious threat (Pet. 5-8, 26), ignoring the contrary factual findings made by the magistrate judge and the district judge sitting in Honolulu. In according proper deference to these findings, the court of appeals recognized that the magistrate judge and the district judge, who are closest to the Hawaiian community and to the controversy, are best situated to sort overheated hyperbole and nonsensical venting from any genuine or parti-

cularized threat directed against any actual person on the basis of non-Native Hawaiian identity.

Third, Petitioners grossly distort and exaggerate the record in stating that "the past several years in Hawaii have witnessed an extraordinary number of 'violent crimes with racial overtones.'" Pet. 6 (quoting Pet. App. 7a). Petitioners offered inadmissible hearsay evidence of only four such incidents occurring over a period of three years around Hawai`i as a result of "road rage" or school yard altercations. 2 E.R. 225-36. None of these incidents had the slightest connection to KS, its admissions policy, or this litigation. Petitioners' reliance on a few isolated and unrelated incidents of racially motivated violence to portray pervasive animus in Hawai`i against "haoles" is as groundless as it is offensive, and was properly discounted by the magistrate judge, the district judge, and the panel. The dissents from the denial of *en banc* review are equally groundless in suggesting that Petitioners' fears are justified by apocryphal stories about racially motivated violence in Hawai`i schools. *E.g.*, Pet. App. 67a-68a; Pet. App. 70a-73a. The magistrate judge and the district judge are best able to evaluate the credibility of such stories, and were well within their discretion in dismissing them as urban myth unworthy of belief and unrelated to any aspect of this case.

Last, Petitioners invoke the possibility of summary reversal, implicitly recognizing that the narrow, fact-bound issues presented here do not warrant this Court's plenary consideration. Pet. 27. Even if Petitioners' arguments for review had any merit (they do not), this case is not a candidate for summary reversal, as that route is generally reserved for those instances where the lower court has "contravened

this Court's clear precedents." *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010); *see also CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009) (summarily reversing where court of appeals committed "clear error" when applying a prior decision of this Court); *Allen v. Siebert*, 552 U.S. 3, 7 (2007) (summarily reversing where prior decision of this Court "preclude[d]" the "Court of Appeals' approach"); *Gonzalez v. Thomas*, 547 U.S. 183, 185 (2006) (summarily reversing because error was "obvious" in light of prior decision of this Court). Here, Petitioners identify no decision of this Court with which the decision below conflicts. Any request for summary reversal is thus improper.

In short, this Court should reject Petitioners' last-ditch plea that this Court substitute its own factual findings and its own discretion for that exercised by a magistrate judge and a district judge, in ordinary proceedings, affirmed by the court of appeals under ordinary abuse-of-discretion review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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